Sheet Metal Workers Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO *and* George Koch Sons, Inc. Cases 25–CB–6260 and 25–CE–36

March 25, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On December 6, 1990, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and the General Counsel filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

The Respondent excepts to the judge's finding a violation of Section 8(b)(3) of the Act in regard to the Integrity Clause because the judge ''failed to undertake a severability analysis'' of the Integrity Clause similar to the analysis requested by the court of appeals in *Sheet Metal Workers Local 91 (Schebler Co.) v. NLRB*, 905 F.2d 417 (D.C. Cir. 1990), enfg. in part and remanding in part 294 NLRB 766 (1989), which also involved the Integrity Clause. The Respondent urges the Board to consolidate this case with *Schebler*, and conduct a severability analysis. We find no merit in these contentions.

We note that, after the Respondent filed its exceptions in the instant case, the Board issued its Supplemental Decision and Order in *Schebler*. See *Sheet Metal Workers Local 91 (Schebler Co.)*, 305 NLRB 1055 (1991). The Board reaffirmed its earlier finding that the Integrity Clause, as a whole, was unlawful and held that the clause would not be rendered valid if one particular provision were removed. Thus, the Board rejected the unions' severability argument. Accordingly, nothing in the Board's supplemental *Schebler* decision supports the Respondent's position here that a severability analysis is appropriate.

In addition, we note that determination of whether a union violates Section 8(b)(3) by insisting to impasse on contract language that constitutes an unlawful subject of bargaining requires that the Board examine the language upon which the union actually insisted. In this case, as the judge found, the Respondent insisted to impasse upon the *entire* Integrity Clause. That clause, as a whole, is unlawful. Therefore, a violation of Section 8(b)(3) has been established. The issue of whether the Respondent lawfully could have insisted to impasse on different contract language is not before the Board and there is no reason for us to express any opinion on it.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sheet Metal Workers Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO, Evansville, Indiana, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

''(b) Sign and mail a copy of the notice to the Charging Party, George Koch Sons, Inc., and to the Sheet Metal Contractors Association of Evansville, Inc.''

Ann Rybolt, Esq., for the General Counsel.
William R. Groth, Esq. (Fillenwarth, Dennerline, Groth & Baird), of Indianapolis, Indiana, for the Respondent.
Arthur D. Rutkowski, Esq. (Bowers, Harrison, Kent & Miller), of Evansville, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Pursuant to charges filed on November 25, 1988, a consolidated complaint issued on August 25, 1988, as amended on May 16, 1989. The complaint alleges that the Respondent, Sheet

[1] The judge found that the Respondent violated Sec. 8(b)(3) of the Act by bargaining to impasse over a Work Preservation clause and by insisting on an Interest Arbitration clause as a condition of reaching agreement on a new labor contract, but that the Respondent did not violate Sec. 8(e) of the Act because the parties failed to ''enter into'' a collective-bargaining agreement containing the Integrity, Work Preservation, and Interest Arbitration Clauses. No exceptions to these findings were filed.

The judge also found that the Respondent violated Sec. 8(b)(3) by bargaining to impasse over the Integrity clause. The Respondent has excepted to that finding.

[2] The Respondent excepts to the requirements in the judge's recommended Order that the Respondent mail a copy of the notice to all employers and employer associations with whom the Respondent has a collective-bargaining relationship. The Respondent argues that such an order is inappropriate because the complaint did not allege either that the Integrity Clause was included in any other labor agreement to which the Respondent is signatory, or that the Respondent sought to obtain the Integrity Clause in any of its other labor agreements. We find merit to this exception. The stipulated evidence shows that it was the policy of the Respondent's International to get this clause into all its locals' contracts, and that the Respondent had sought and obtained this clause in its collective-bargaining agreement with Sheet Metal Contractors Association of Evansville, Inc. The International, however, is not a party to this proceeding. Further, there is no evidence that the Respondent adopted this policy by seeking to obtain the Integrity Clause in its collective-bargaining agreements with any other employer or employer association. Accordingly, we shall modify the Order to provide that the Respondent mail a copy of the notice to the Charging Party and to the Sheet Metal Contractors Association of Evansville, Inc.

Metal Workers Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO (the Local or International Union, respectively) violated Section 8(e) and Section 8(b)(3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying that it had committed any unfair labor practices.

Waiving their right to a hearing on the contested allegations of the complaint, the parties entered into a stipulation of facts regarding negotiations between the Respondent and the Charging Party for a successor labor contract, referred to as the ''Building Trades Agreement,'' or ''BTA.''[1] This matter, originally assigned to Administrative Law Judge Norman Zankel for decision, was transferred to me following his untimely demise.

On the entire record, including the stipulation of facts, joint exhibits,[2] and poststipulation briefs submitted by counsel for the General Counsel (General Counsel) and the Respondent, I make the following

I. FINDINGS OF STIPULATED FACT

A. *Jurisdictional Findings*

At all times material, the Employer, an Indiana corporation, maintained its principal office and various places of business in Evansville, Indiana, where it designed, manufactured, and installed oven systems, finishing systems, auxiliary components, conveyor systems, and various other products for commercial and industrial customers.

During the past 12 months, the Employer, in the course and conduct of its business operations, purchased and received at its Evansville facility products, goods, and materials valued in excess of $50,000 and derived gross revenues in excess of $500,000. The complaint alleges, and I find, that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

B. *Background*

Since the mid-1950s, the Respondent, Local Union No. 20, has represented a unit of Koch employees who perform sheet metal work as described in article I of Joint Exhibit 1. The Building Trades Agreement, or BTA (Jt. Exh. 1), the parties' last labor contract, was effective from May 1, 1984, through April 30, 1987.[3]

In fact, the Charging Party did not participate in bargaining which produced the 1984–1987 BTA. Although not a member of, nor represented by a multiemployer association, Koch adopted the collective-bargaining agreement negotiated between Local 20 and the Sheet Metal Contractors Association of Evansville, Inc. (SMCA), an organization of employers engaged, inter alia, in fabricating, installing, and/or servicing ferrous products in the Evansville, Indiana area.

In 1982, the International adopted a policy (Resolution 78) of granting discretionary wage and benefit concessions to help signatory employers to better compete with nonunion firms. Thereafter, in 1985, in an effort to thwart a perceived threat from contractors who operated both unionized and nonunionized shops (the so-called double breasted employer) the International announced a new policy exhorting its local unions to deny economic concessions to those contractors who refused to incorporate an ''Integrity Clause'' in their collective-bargaining agreements.

The text of the Integrity Clause is reproduced in pertinent part.[4] To briefly summarize, the Integrity Clause requires that a signatory employer representing it is not a ''bad-faith employer''; that is, one who either operates or is affiliated with any nonunion business performing sheet metal work,

[1] The Respondent and Charging Party entered into a settlement agreement resolving allegations in the complaint concerning a successor Paint Finishing Agreement, covering a separate unit of Koch employees who were engaged in fabricating oven and paint finishing systems.

[2] Joint exhibits will he referred to as Jt. Exh. followed by the appropriate exhibit number.

[3] Hereinafter, all events took place in 1987, unless otherwise noted.

[4] Sec. 1. Integrity Clause

A ''bad-faith employer'' for purposes of this Agreement is an Employer that itself, or through a person or persons subject to an owner's control, has ownership interests (other than a noncontrolling interest in a corporation whose stock is publicly traded) in any business entity that engages in work within the scope of SFUA Article 1 hereinabove using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreement, of, if such business entity is located or operating in another area, inferior to those prescribed in the agreement of the sister local union affiliated with Sheet Metal Workers' International Association, AFL–CIO in that area.

An employer is also a ''bad-faith employer'' when it is owned by another business entity as its direct subsidiary or as a subsidiary of any other subsidiary within the corporate structure thereof through a parent-subsidiary and/or holding company relationship, and any other business entity within such corporate structure is engaging in work within the scope of SFUA Article I hereinabove using employees whose wage package, hours and working conditions are inferior to those prescribed in this Agreement, or if such other business entity is located or operating in another area, inferior to those prescribed in the Agreement of the sister local union affiliated with Sheet Metal Workers' International Association, AFL–CIO in that area.

Sec. 2: Any Employer that signs this Agreement or is covered thereby by virtue of being a member of a multi-employer bargaining unit expressly represents to the union that it is not a ''bad faith employer'' as such term is defined in Section 1 hereinabove, and further agrees to advise the union promptly if at any time during the life of this Agreement said Employer changes its mode of operation and becomes a ''bad-faith employer.'' Failure to give timely notice of being or becoming a ''bad-faith employer'' shall be viewed as fraudulent conduct on the part of such Employer.

In the event any Employer signatory to or bound by this Agreement shall be guilty of fraudulent conduct as defined above, such Employer shall be liable to the Union for liquidated damages at the rate of $500 per calendar day from the date of the failure to notify the Union until the date on which the Employer gives notice to the Union.

Sec. 3: Whenever the Union becomes aware that an Employer has been or is a ''bad-faith employer,'' it shall be entitled, notwithstanding any other provision of this Agreement, to demand that the Agreement between it and such ''bad-faith employer'' be rescinded. A claim for recision shall be processed by the Union as a contract grievance. . . . [In Local 91's proposal to Koch, the three sections of the Integrity Clause were designated a, b, and c.)

whether within or beyond the jurisdiction of the local union, where the wages, hours, and working conditions are inferior to those provided in the labor agreement. Further, the employer must notify the union promptly should it become a bad-faith employer. Failure to do so would constitute ''fraudulent conduct'' subjecting the employer to liquidated damages at the rate of $500 per calendar day. Lastly, the union is entitled to rescind the agreement on learning of an employer's bad faith.

C. *The Parties' 1987 Negotiations*

In the latter part of January 1987,[5] Koch and the Respondent each notified the other that they wished to reopen and modify the terms of the BTA due to expire on April 30. They subsequently agreed to postpone meeting until the Respondent and the SMCA concluded negotiations for a successor agreement. The SMCA and the Respondent reached such agreement on June 24.

Representatives for Koch and Local 20 held their first bargaining session on July 13. However, even before bargaining commenced, the Respondent notified the National Joint Adjustment Board for the Sheet Metal Industry (the NJAB), that the parties had failed to reach agreement on a successor BTA. A principal purpose of the NJAB, a body composed of an equal number of International Union and SMCA delegates, was to resolve disputes between any signatory to the BTA and the Unions.

In applying to the NJAB, the Respondent was invoking the Interest Arbitration clause of the BTA which provided, in pertinent part, that ''any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement'' may be submitted for resolution to the NJAB. (Jt. Exh. 1, art. X, § 8.) On learning that the parties had not yet commenced bargaining, the NJAB ruled on June 24 that the matter was not ripe for resolution.

Thereafter, between July 13 and October 21, the parties met on 12 different occasions, exchanged proposals and counterproposals, offers and counteroffers. Throughout this period of time, as conditions precedent to consummating a successor BTA, the Respondent insisted that the Employer agree to three provisions: the Integrity Clause described above; a fourth section added to the Integrity Clause but separately titled ''Work Preservation Clause,'' in which the employer pledges that it will not create a double-breasted business, but if it does so, it will be subject to the same penalties set forth in the Integrity Clause; and an Interest Arbitration clause identical to the one which appeared in the predecessor agreement, which provided that disputes arising out of the parties' failure to negotiate a renewal of their collective-bargaining agreement shall be submitted to the NJAB for resolution. The Work Preservation clause is set forth verbatim below while the Interest Arbitration provision appears as Appendix A to this decision.[6]

Koch agreed to the three proposals, but with certain reservations. Specifically, the Company agreed to accept the Integrity and Work Preservation clauses only if they were found legal and enforceable by the Board and the courts, it also agreed to the Interest Arbitration clause, on condition that both parties consent to submit the dispute to the NJAB. The Union rejected the Employer's positions.

In July, both parties submitted additional proposals and documentation to the NJAB which heard their dispute on August 4. In an August 7 ruling, the NJAB again declined to decide the merits of the dispute, but continued to retain jurisdiction. The parties persisted in their bargaining efforts into the fall, but by October 28, the date of their last negotiating session, had failed to reach agreement on any term of a successor BTA.

After considering the merits of the dispute at a hearing on November 10 at which representatives for Koch and the Union appeared, the NJAB issued a decision dated November 12 ordering that the parties execute a BTA with terms identical to those contained in 1987–1991 master collective-bargaining agreement between the Union and the SMCA. Thus, pursuant to the NJAB's ruling, Koch was ordered to enter into a successor BTA which retained intact the Respondent's Integrity and Work Preservation clauses. The Company also was ordered to accept article X, section 8, which, in accordance with an addendum to the multiemployer agreement, provided that submissions to the NJAB would be by the parties' mutual consent, as Koch initially had proposed.

To date, the parties have not executed a collective-bargaining agreement pursuant to the NJAB's November 12 directive. Instead, the Company filed unfair labor practice charges on November 25 protesting, inter alia, the Union's bargaining to impasse on an illegal demand for the Work Preservation and Integrity clauses and the nonmandatory Interest Arbitration provision. (Jt. Exh. 16(a).) The Company has not hired any local members on a regular, full-time basis since 1983. However, on those occasions when it has temporarily employed a unit member, Koch has followed the terms of the 1987 BTA except for the Integrity and Work Preservation clauses.

D. *The Issues*

Allegations in the consolidated complaint and the stipulated record pose the following issues:

(1) Whether the parties ''entered into'' a collective-bargaining agreement containing the Integrity and Work Preservation clauses.

(2) Whether the Integrity and Work Preservation clauses require that a contractor signatory cease and refrain from handling, using, selling, transporting, or otherwise dealing in the product of, or cease doing business with any other employer within the meaning of Section 8(e) of the Act.

(3) Whether the Integrity, Work Preservation and Interest Arbitration clauses are nonmandatory subjects of bargaining.

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[5] Unless otherwise noted, all events are in 1987.

[6] It reads:

d. Work Preservation Clause

The Employer agrees that no evasion of the terms, requirements and provisions of this Agreement will take place by the setting up of another business to do work covered by this agreement, or in any other way attempt to or actually evade or nullify responsibility hereunder. If and when the Employer shall perform any work of the type prohibited by Section 1(a) hereof, the terms and conditions of this Agreement shall be applicable to all such work.

In the event that the conditions set forth in the paragraph above are met but the Agreement is not deemed applicable to the non-signatory entity, then the Employer shall be liable to the Union for all damages incurred.

(4) If so, whether the Respondent violated Section 8(b)(3) of the Act by insisting as a condition to consummating a BTA, that Koch agree to each of the three disputed clauses.

II. DISCUSSION AND CONCLUDING FINDINGS

A. *The Parties did not enter into an Agreement*

Section 8(e), commonly known as the ''hot cargo'' clause, provides in pertinent part that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such agreement shall be to such extent unenforceable and void.

Because Section 8(e) prohibits unions and employers from ''entering into'' hot cargo agreements, it is necessary to ask whether the parties in this proceeding actually executed a contract, before determining if it contains an unlawful clause. Here, paragraph 47 of the stipulated facts provides a ready answer to this threshold inquiry. It states ''At no time since November 12, 1987 have the Charging Party and the Respondent executed an agreement to succeed Joint Exhibit 1.'' Thus, it is beyond dispute that the Respondent and the Charging Party have no contract and without that, there was no ''entering into.''

Koch applied most terms of the BTA to unit members who it hired on a temporary basis but refused to adopt the challenged Integrity and Work Preservation clauses. The Company's partial compliance with the BTA cannot create an inference that it impliedly entered into a constructive agreement. To the contrary, its rejection of the contested provisions and its filing unfair labor practice charges, ''revealed that it was not agreeing with the Respondent as to an 8(e) arrangement.'' *Teamsters Local 754 (Glenora Farms)*, 210 NLRB 483, 490 (1974).

The General Counsel relies on a handful of cases to support the contention that Respondent's submitting the dispute to the NJAB and the NJAB's decision directing the parties to execute an agreement containing the contested provisions, somehow constituted an ''entering into.'' See, e.g., *Teamsters Local 467 (Beaumont Concrete)*, 265 NLRB 1679, 1681 (1982); *Teamsters Local 89*, 254 NLRB 783, 785 (1981); *Hotel & Restaurant Employees Local 531*, 237 NLRB 1204, 1206 (1978); *Boilermakers (Bigge Drayage Co.)*, 197 NLRB 281, 287 (1972).

The General Counsel's reliance on the above-cited cases is misplaced. To be sure, these precedents clearly hold that a demand for compliance with or the maintenance, enforcement, or reaffirmation of a hot cargo clause may represent an ''entering into,'' but only where a collective-bargaining agreement already is in effect. A mere demand that an employer enter into a hot cargo agreement does not satisfy the ''entering into'' requirement.[7]

Where, as here, an employer and union have not entered into a collective-bargaining agreement, there can be no violation of Section 8(e). Accordingly, this allegation in the complaint must be dismissed.

B. *The Respondent Violated Section 8(b)(3)*

1. The integrity and work preservation clauses are illegal bargaining subjects

Although an element critical to finding an 8(e) infraction is missing here, this does not end the matter, for the complaint also alleges that the Respondent violated Section 8(b)(3) by insisting to impasse on nonmandatory subjects of bargaining; that is, the Integrity, Work Preservation, and Interest Arbitration clauses.

Section 8(b)(3) simply states that it shall be unlawful for a labor organization ''to refuse to bargain collectively with an employer.'' The Board and the courts have given content to this bare language by categorizing bargaining subjects into three areas—mandatory, permissive, and illegal. Generally speaking, mandatory subjects are those which vitally affect terms and conditions of employment of bargaining unit employees or have a substantial impact on the bargaining unit, so that neither party is legally obligated to yield. *NLRB v. Borg Warner Corp.*, 356 U.S. 342, 349 (1958). As for permissive subjects, ''each party is free to bargain or not to bargain, and to agree or not to agree.'' Id. In other words, if either party refuses to bargain about a permissive subject, there is no violation of Section 8(a)(5) or Section 8(b)(3). Conversely, insistence to the point of impasse on including a permissive subject as a prerequisite to entering into an agreement constitutes a refusal to bargain. Ibid.

Of course, neither an employer nor union may insist on including a clause in a collective-bargaining agreement which would be illegal under the Act. Id. at 360 (J. Harlan, concurring). Early on, in *Maritime Union (Texas Co.)*, 78 NLRB 971 (1948),[8] in finding that insistence on an illegal provision constituted a refusal to bargain, the Board stated:

> Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.

A clear example of an illegal bargaining demand is one which insists on including in the agreement, a hot cargo clause violative of Section 8(e). See, e.g., *Operating Engineers (York County Bridge)*, 216 NLRB 408–410 (1975), enfd. 532 F.2d 9012 (3d Cir. 1976), cert. denied 429 U.S. 1072 (1977); *Bricklayers Local 5 (General Contractors Assn.)*, 152 NLRB 360, 366 (1965), enfd. as modified 378 F.2d 859 (6th Cir. 1967); *Graphic Communications Workers*, 130 NLRB 985, 991 (1961).

In light of the foregoing precedents, it is necessary to examine Respondent's Integrity and Work Preservation propos-

[7] Conduct which aims at compelling an employer to enter into such an agreement may violate Sec. 8(b)(4) but not Sec. 8(e).

[8] Enfd. 175 F.2d 686 (2d Cir. 1949), cert. denied 338 U.S. 954 (1950).

als to determine whether they are repugnant to the language or underlying purpose of Section 8(e). In fact, the outcome of such an examination is preordained for in a recent decision, *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766 (1989), enfd. in part and denied in part 905 F.2d 417 (D.C. Cir. 1990), the Board, with court approval, concluded that the Integrity Clause had an unlawful purpose within the intendment of Section 8(e).[9]

In *Schebler Co*., the Board, adopting the decision of the administrative law judge (judge) ruled that Sheet Metal Workers Local Union 91 unlawfully entered into a collective-bargaining agreement with one contractor, Winger, which contained the same Integrity Clause at issue here. The Board further held that the Sheet Metal Workers International Unions coerced the Schebler Company in violation of Section 8(b)(4)(ii)(A) by denying it economic relief granted to other employers who agreed to accept the Integrity Clause.

In evaluating the lawfulness of the Integrity Clause, the judge noted, at the outset, that the distinction between a lawful primary agreement and a prohibited one turns on ''whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees'' or is ''tactically calculated to satisfy union objectives elsewhere.'' *Schebler Co*., supra, citing *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 644–645 (1967). In analyzing the Integrity Clause in light of this standard, the judge concluded that it was not limited to protecting bargaining unit work. Rather, the clause was crafted to pressure signatory contractors to cease doing business with nonunion entities, or to use their influence to compel related firms to adopt union scale wages and benefits under threat of contract rescission. The judge held that using such methods for an unlawful purpose was clearly coercive and violative of Sec. 8(e).

In reaching this conclusion, the judge rejected Respondent's argument that the Integrity Clause simply required signatories to supply information on which the union may base its decision whether to enter into or continue to maintain a collective-bargaining relationship. Instead, he found that the information section, which standing alone, might not have a secondary object, was ''merely part of an overall effort to require the signatory employer to change the operations of its related entities under penalty of contract recision.'' *Schebler Co*., supra. In other words, it was only when the first two sections were read together with the third section that the unlawful object of the entire Integrity Clause became manifest.

The judge looked not only to the terms of the clause itself as evidence of its unlawful intent. He also found that extrinsic evidence—the International's declaration ''that the purpose of the Clause was to force contracting employers to become either '100% union or 100% non-union''' demonstrated its unlawful intent.

The second contractor in the Local 91 case, *Schebler*, refused to adopt the Integrity Clause, choosing instead to file an unfair labor practice charge. The judge reasoned that granting economic relief to some employers while denying it to Schebler unless it signed the Integrity Clause was a form of coercion which had the proscribed object under Section 8(b)(4)(ii)(A) of ''forcing or requiring an employer to enter into an agreement which is prohibited by section 8(e).'' *Schebler Co*., supra.

In the instant case, Koch, like the Schebler Company, refused to enter into an agreement containing the Integrity and Work Preservation clauses. Thus, as a technical matter, the Respondent did not ''enter into'' a hot cargo contract. Nevertheless, the *Schebler* decision makes it clear that the Integrity Clause which Local 20 proposed to Koch as the price of reaching agreement, was repugnant to the basic purpose underlying Section 8(e). Had the Employer agreed to enter into such a contract, a violation of Section 8(e) certainly would follow. *Sheet Metal Workers Local 91*, supra.[10]

Moreover, a letter from the International to its Locals, identical to the one relied on in *Schebler*, explicitly stated the Union's avowed interest in compelling contractors to decide whether they would be ''100% union or 100% non-union.'' As the judge found in *Schebler*, this letter buttresses the conclusion that Respondent had an unlawful secondary objective.

Section d, the Work Preservation Clause, was no less secondary in purpose than the preceding sections of the Integrity Clause. It, too, was framed in terms so broad as to permit interference with business relationships among employers who were not necessarily created as alter egos. Moreover, by its terms, clause d could have applied to such entities even if they functioned outside the geographical jurisdiction of the Respondent. Thus, despite its title, this provision was not limited to preserving bargaining unit work. Further, the Work Preservation Clause incorporated by reference the preceding three portions of the Integrity Clause, including the remedial section permitting contract recision. Thus, the Work Preservation section, like the balance of the Integrity Clause, was structured in a way as to impose illegal secondary pressure on signatory employers to satisfy union objectives elsewhere.[11]

Respondent contends in its brief that the Integrity Clause does not offend Section 8(e) because it does not require that contractors cease doing business with nonunionized establishments, even though that could be an incidental effect. In rejecting Respondent's contention, I rely on the court of appeals opinion in *Schebler*, 905 F.2d 417 (D.C. Cir. 1990), which made short shrift of this same argument:

> By prohibiting certain secondary activity based on ''express or implied'' agreements, section 8(e) was in-

[9] While affirming the conclusion that the Integrity Clause as a whole had a secondary objective violative of Sec. 8(e), the appellate court remanded the matter so that the Board could consider whether any illegality could have been cured by severing the recision remedy in sec. 3 from secs. 1 and 2 of the clause. 905 F.2d 417.

[10] Even if the Union insisted on the Employer's accepting the Integrity Clause in the good-faith but mistaken belief that its demand was legal and a mandatory subject of bargaining, this would not be a valid defense to a refusal-to-bargain allegation. See *Associated General Contractors v. NLRB*, 465 F.2d 327 (7th Cir. 1972), cert. denied 409 U.S. 1108 (1973).

[11] In its brief, the Respondent did not claim that the the Integrity and Work Preservation clauses were privileged under the construction industry provision of Sec. 8(e). Since the burden of establishing such privilege rests on the party attempting to invoke it, I find that the Respondent has waived any reliance on the proviso. See *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294, 296 (1985). However, even if the Respondent was entitled to claim the protections of that proviso, I would find such a defense without merit based on the persuasive analysis in *Sheet Metal Workers Local 91*, supra.

> tended to close a loop-hole . . . through which unions used ''hot cargo'' clauses to ''exert subtle pressures upon employers to engage in ''voluntary boycotts.'' In the instant case, the Board reasonably concluded that the contract-recission mechanism of section three exerted the requisite degree of pressure not to deal with nonunionized contractors. [Citation omitted.]

As noted above, the court of appeals remanded the *Schebler* case so that the Board could consider whether the first two sections of the Integrity Clause would be lawful if severed from the third section's penalty of contract recision. *Sheet Metal Workers Local 91 v. NLRB*, supra. The remanded matter is pending before the Board. However, the ultimate disposition of the severability issue would not alter the result reached in the instant case since the stipulated record here indicates that the Respondent demanded that Koch adopt the entire Integrity Clause in an unsevered state.

It is automatic that a labor organization violates Section 8(b)(3) when it conditions its agreement to a new contract on an employer's acceptance of an unlawful subject of bargaining. Consequently, the *Schebler* decision, taken together with such precedents as *York County Bridge*, supra; *Bricklayers Local 5*, supra; and *Graphic Communications Workers*, supra, compel the conclusion that by insisting on including the unlawful Integrity and Work Preservation clauses in its contract with Kock, the Respondent violated Section 8(b)(3) of the Act.[12]

2. The interest arbitration clause is a permissive bargaining subject

Article X, section 8, which provides that ''any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement,'' is an Interest Arbitration provision. See *Tampa Sheet Metal Co*., 288 NLRB 322 (1988); *Sheet Metal Workers Local 59*, 227 NLRB 520 (1976). As such, it provides a mechanism for resolving disputes which may arise as to the terms of future contracts. Since it does not address employees' terms and conditions of employment but rather governs the relationship between the employer and the union, it is a nonmandatory subject of bargaining. *Sheet Metal Workers Local 38 (Elmsford Sheet Metal Works)*, 231 NLRB 699, 700 (1977).

Of course, parties may agree voluntarily on an Interest Arbitration clause. However, the Board, with court affirmance, consistently has held that such a provision is a permissive subject of bargaining. *Sheet Metal Workers Local 59*, 227 NLRB 520 (1976); *Printing Pressman Local 329 (Greensboro News)*, 222 NLRB 893 (1976), enfd. 549 F.2d 308 (4th Cir. 1977); *Columbus Printing Pressman (R. W. Page Corp.)*, 219 NLRB 268 (1975), enfd. 543 F.2d 1161 (5th Cir. 1976). Therefore, even though Koch bargained with respect to an Interest Arbitration provision, it was not legally obliged to accept the Union's demand regarding the terms of that clause. Consequently, Respondent's insistence to impasse on its own version of the Interest Arbitration clause constituted a refusal to bargain within the meaning of Section 8(b)(3).[13] *Elmsford Sheet Metal Works*, supra at 700–701; *R. W. Page Corp*., supra at 281–282.

[12] In *Schebler*, the judge rejected the contention that the Respondent violated Sec. 8(b)(3). However, his reasons for doing so, based on specific circumstances present in that case, distinguish the outcome here from the result reached on that issue in *Schebler*. There, the judge noted that it was the contractor who initiated the request for economic relief during the term of an existing agreement, even though there was no valid reopener clause. The judge reasoned that since the Respondent had no duty to negotiate or to accede to Schebler's request for midterm modification of the contract, merely proposing a clause violative of Sec. 8(e), did not constitute bargaining to impasse. *Schebler*, supra. By contrast, in the present case, the Union insisted that Koch had to accept the Integrity Clause as the price of reaching a new agreement.

CONCLUSIONS OF LAW

1. By bargaining to impasse on a subject which has an illegal objective within the intendment of Section 8(e); that is, the Integrity and Work Preservation clauses, the Respondent violated Section 8(b)(3) of the Act.

2. The Respondent further violated Section 8(b)(3) by insisting on a permissive subject of bargaining, i.e., an Interest Arbitration clause, as a condition of reaching agreement on a new labor contract.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. As the parties failed to ''enter into'' a collective-bargaining agreement containing an Integrity and Work Preservation clause, the Respondent has not violated Section 8(e) of the Act. Accordingly, this allegation shall be dismissed.

REMEDY

Having found that the Respondent has committed an unfair labor practice, I shall recommend the issuance of an order directing it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Because the posting of a single notice may not adequately inform employers that the Integrity and Work Preservation clauses have an unlawful objective under Section 8(e), and that the Respondent may not bargain to impasse with regard to those clauses, I shall recommend that Respondent be ordered to mail a copy of the attached notice to all signatory employers within its jurisdiction.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Sheet Metal Workers Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO, Evansville, Indiana, its officers, agents, and representatives, shall

1. Cease and desist from

[13] Although the NJAB decided in the Company's favor, that is, that the Interest Arbitration provision would require submissions by mutual consent, the Board's ruling does not alter the fact that the Respondent admittedly bargained to impasse regarding this nonmandatory subject prior to the December 10 hearing.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Insisting to impasse on the Integrity, Work Preservation, and Interest Arbitration clauses in violation of Section 8(b)(3) of the Act.

(b) In any like or related manner condition its acceptance of a collective-bargaining agreement on illegal or permissive bargaining subjects.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business office and meeting halls copies of the attached notice marked ''Appendix B.''[15] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by an authorized representative of Respondent, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail a copy of the notice to all employers or employer associations with whom it has a collective-bargaining relationship.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that all allegations of unfair labor practices in the complaint, except for the one found, be dismissed.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A
ARTICLE X, SECTION 8

(Jt. Ex. 4(a), p. 15; Jt. Ex. 7(a), pp. 3–4; Jt. Ex. 11(a), p. 6)

Section 8. In addition to the settlement of grievances arising out of interpretation or enforcement of this agreement as set forth in the preceding section of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided: (See Addendum X. Section 8.)

(a). Should the negotiations for a renewal of this Agreement become deadlocked in the opinion of the Union representative(s) or of the employer(s) representative, or both, notive to that effect shall be given to the National Joint Adjustment Board.

If the Co-Chairmen of the National Joint Adjustment Board believe the dispute might be adjusted without going to final hearing before the National Joint Adjustment Board, each will then designate a panel representative who shall proceed to the locale where the dispute exists as soon as convenient, attempt to conciliate the differences between the parties and bring about a mutually acceptable agreement. If such panel representatives or either of them conclude that they cannot resolve the dispute, the parties thereto and the Co-Chairmen of the National Joint Adjustment Board shall be promptly so notified without recommendation from the panel representatives. Should the Co-Chairmen of the National Joint Adjustment Board fail or decline to appoint a panel member or should notice of failure of the panel representatives to resolve the dispute be given, the parties shall promptly be notified so that either party may submit the dispute to the National Joint Adjustment Board.

In addition to the mediation procedure set forth above or as an alternate thereto, the Co-Chairmen of the Board may each designate a member to serve as a subcommittee and hear the dispute in the local area. Such committees shall function as arbitrators and are authorized to resolve all or part of the issues. They are not, however, authorized to deadlock and the matter shall be heard by the National Joint Adjustment Board in the event a subcommittee is unable to direct an entire resolution of the dispute.

The dispute shall be submitted to the National Joint Adjustment Board pursuant to the rules as established and modified from time to time by the National Joint Adjustment Board. The unanimous decision of said Board shall be final and binding upon the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached. There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.

(b). Any application to the National Joint Adjustment Board shall be upon forms prepared for that purpose subject to any changes which may be decided by the Board from time to time. The representatives of the parties who appear at the hearing will be given the opportunity to present oral argument and to answer any questions raised by members of the Board. Any briefs filed by either party including copies of pertinent exhibits shall also be exchanged between the parties and filed with the National Joint Adjustment Board at least twenty-four (24) hours in advance of the hearing.

(c). The National Joint Adjustment Board shall have the right to establish time limits which must be met with respect to each and every step or procedure contained in this Section. In addition, the Co-Chairmen of the National Joint Adjustment Board shall have the right to designate time limits which will be applicable to any particular case and any step therein which may be communicated to the parties by mail, telegram or telephone notification.

(d). Unless a different date is agreed upon mutually between the parties or is directed by the unanimous decision of the National Joint Adjustment Board, all effective dates in the new agreement shall be retroactive to the date immediately following the expiration date of the expiring agreement.

All correspondence to the National Joint Adjustment Board shall be sent to the following address: National Joint Adjustment Board, P.O. Box 829, Merrifield, VA 22116-2829.

See Addendum X.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT insist to impasse on inclusion in a collective-bargaining agreement of an Integrity, Work Preservation, or Interest Arbitration clause.

WE WILL NOT in any like or related manner condition our agreement to a collective-bargaining contract on an employer's acceptance of illegal or mandatory subjects of bargaining.

SHEET METAL WORKERS LOCAL UNION NO. 20